Lutheran Home at Moorestown *and* Communication Workers of America, AFL–CIO. Case 4–CA–30047

June 22, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

Pursuant to a charge filed on January 11, 2001, and an amended charge filed on February 2, 2001, the Acting General Counsel of the National Labor Relations Board issued a complaint on February 2, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–19855. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On March 5, 2001, the Acting General Counsel filed a Motion for Summary Judgment. On March 6, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and an "Appeal from Action of the Regional Director Denying Respondent's Motion for Reconsideration and Other Relief." Counsel for the Acting General Counsel filed a reply. Thereafter, the Respondent requested and the Board granted leave to respond to the matters raised by the Acting General Counsel's reply. The Charging Party has filed a statement in opposition to the position of the Respondent.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admitted its refusal to bargain, but asserted that the case should be held in abeyance pending the Supreme Court's decision in *Kentucky River Community Care v. NLRB*, 193 F.3d 444 (6th Cir. 1999), cert. granted 121 S.Ct. 27 (2000). Further, in its response to the Board's Notice to Show Cause, the Respondent contends that the Regional Director lacked authority to issue the complaint in this case because there was "no General Counsel appointed by the President in a manner that comports with requirements of the 29 U.S.C. Sec. 153(d)."

The Respondent requested that we defer processing the motion or deny it outright because, it asserts, the issue of the supervisory status of registered nurses (RNs) and licensed practical nurses (LPNs) is common to both this case and *Kentucky River*, and the Supreme Court decision in *Kentucky River* will resolve the issue presented here. Subsequent to the filing of the Respondent's answer and response to the Notice to Show Cause, the Supreme Court, on May 29, 2001, issued its decision in *Kentucky River*.[1] We find, however, that the court's decision does not warrant either denying the Acting General Counsel's motion, or deferring the processing of the motion pending further administrative proceedings.

The supervisory status of the Respondent's RNs and LPNs was litigated in the underlying representation case. Indeed, it was litigated in both the preelection and the postelection proceedings and on each occasion, the matter was resolved against the Respondent by findings that the nurses involved were not supervisors. The Respondent did not request Board consideration of those findings either by filing a request for review of the Regional Director's Decision and Direction of Election or by filing exceptions to the hearing officer's report on objections to the election. The Respondent, therefore, failed to exhaust its administrative remedies and, under Section 102.67(f) of the Board's Rules and Regulations, is precluded from raising the issue directly by a motion for reconsideration or indirectly by a request that we defer processing the case.[2] Accordingly, we deny Respondent's request as well as its appeal from the Regional Director's order denying the Respondent's motion for reconsideration.

The Respondent also contends that we should deny the motion because the complaint issued at a time when there was no properly appointed General Counsel. We find no merit in the Respondent's contention. The Acting General Counsel was appointed pursuant to 5 U.S.C. §3345(a), as amended by the Federal Vacancies Reform Act of 1998, an "alternative procedure" for temporarily occupying an office. S. Rep. No. 105–250, 105th Cong., 2d Sess. 17 (1998). We do not believe it appropriate for us to decide, in this unfair labor practice case, whether or not the President of the United States made a proper appointment under that statute. In any event, we are not persuaded, based on the Respondent's arguments, that the Acting General Counsel's appointment was clearly improper.[3] We therefore reject the Respondent's conten-

[1] 121 S.Ct. 1861 (2001).

[2] See *Dynacorp/Dynair Services*, 322 NLRB 602 (1996). See also *Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760 (3d. Cir. 1997), enfg. 321 NLRB 659 (1996).

[3] In addition to defending the propriety of the appointment under §3345, the Acting General Counsel argues that the Office of the General Counsel is afforded special protections under §3348 that insulate complaints from any challenge based on alleged defects in his appointment. In view of our finding that the Respondent has failed to establish

tion that the Motion for Summary Judgment should be denied on this ground. See *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926) (presumption of regularity supports the official acts of public officers in the absence of clear evidence to the contrary).

Because all representation issues were or could have been litigated in the prior representation proceeding and the Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, we find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[4] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[5]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation, has been engaged in the operation of a nursing home at its facility in Moorestown, New Jersey. During the calendar year immediately preceding issuance of the complaint, the Respondent, in conducting its normal business operations, received gross revenues in excess of $100,000, and purchased and received at its New Jersey facility goods valued in excess of $5,000 directly from points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held April 28, 2000, the Union was certified on October 19, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) employed by the Respondent at its 255 East Main Street, Moorestown, N.J. facility, excluding all other employees, the Administrator, Assistant Administrator, the Director of Nursing, the Assistant Director of Nursing, MDS Coordinator, Unit Managers, RN Supervisors, Certified Nursing Assistants, Nursing Assistants, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since January 3, 2001, the Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after January 3, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Lutheran Home at Moorestown, Moorestown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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that the appointment was clearly defective under §3345, we find it unnecessary to address this additional argument.

Chairman Hurtgen does not agree that the Respondent must show that the appointment was "clearly improper." It is sufficient to show that it was improper. However, Chairman Hurtgen agrees that this showing has not been made.

[4] We also reject the Respondent's contention that the Supreme Court's grant of certiorari is a "special circumstance" warranting denial of the motion here.

[5] The Respondent also denied pars. 6 and 7 of the complaint, which allege that since January 3, 2001, the Respondent has refused to recognize and bargain with the Union. However, it is clear from its answer and from its position as set forth above that its denial of these complaint allegations is premised on its view that it is under no legal obligation to bargain with the Union because the Supreme Court's decision in *Kentucky River* might invalidate the certification. We find that the Respondent's denial raises no material issues of fact warranting a hearing.

(a) Refusing to bargain with the Communications Workers of America, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) employed by the Respondent at its 255 East Main Street, Moorestown, N.J. facility, excluding all other employees, the Administrator, Assistant Administrator, the Director of Nursing, the Assistant Director of Nursing, MDS Coordinator, Unit Managers, RN Supervisors, Certified Nursing Assistants, Nursing Assistants, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Moorestown, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Communications Workers of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) employed by us at our 255 East Main Street, Moorestown, N.J. facility, excluding all other employees, the Administrator, Assistant Administrator, the Director of Nursing, the Assistant Director of Nursing, MDS Coordinator, Unit Managers, RN Supervisors, Certified Nursing Assistants, Nursing Assistants, guards and supervisors as defined in the Act.

LUTHERAN HOME AT MOORESTOWN